SECRET

26 September 1966

OGC Has Reviewed

MEMORANDUM FOR: Mr. Bannerman Via Mr. Warfield

I talked with [redacted] about 25X1
the application of the Virginia retail sales and use tax to the Employees Activity Association. Ben had previously consulted representatives of the Office of General Counsel. He was advised by the Office that, since the Employee Activity Association is not an official Government operation, the law does apply to the Association.

With the assistance of General Counsel, Ben has taken the necessary steps for full compliance.

[redacted] STAT
VRT

cc: D/Pers
Attention: [redacted] 25X1

Noted /ok.

[redacted] 25X1
25 Oct 66

STAT [redacted] Bldg. 1218

Please check with

STAT [redacted] as to

the Employees Activity Assoc.

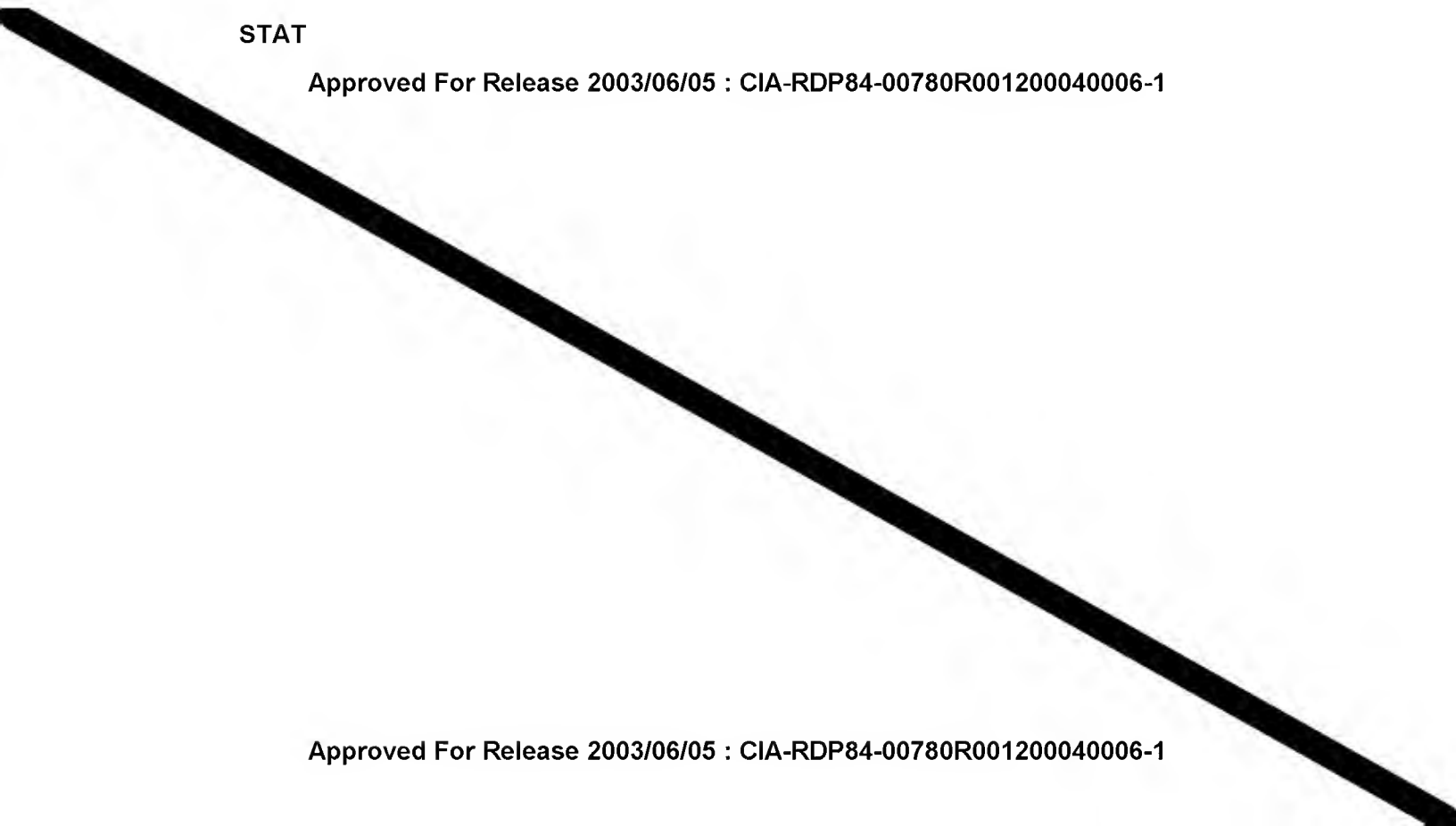
Do they collect the tax

or have they officially

been exempted?

STAT [redacted]

22 Sept. 66



ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM:
STAT
Associate General Counsel
STAT

EXTENSION

NO. OGC 66-5240

DATE 21 September 1966 STAT

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
1. Deputy Director for Support	22 Sept			George Meloon to [redacted] to me have related your desire to be assured as to the opinion we sent to [redacted] concerning the application of the new Virginia Sales Tax to the Executive Dining Room, OGC 66-2045, 9 September 1966. I attach a copy of a memorandum for the record, also of 9 September, which sets forth the legal background upon which [redacted] based his memorandum to [redacted] We did not include this background in the outgoing memorandum since it contains the details and analysis of law which, I felt, would not be of particular interest to the addressee.
STAT [redacted]				
2.				
3.				
4.				
5.				
6.				
7.				
8.				
9.				Mr. Houston also approves the memoranda.
10.				[redacted] STAT
11.				A good Labor, I now feel assured.
12.				[redacted] STAT
13.				22 Sept.
14.				
15.				

OGC 66-2045

9 September 1966

25X1 MEMORANDUM FOR: [redacted] SA/DL

SUBJECT: Application of the Virginia Retail Sales and Use Tax to the Operations of the Agency Executive Dining Room

1. In response to your oral request, this memorandum is to confirm my telephone advice to you of 31 August 1966, that it is the opinion of this Office that the Executive Dining Room is not subject to the Virginia tax, neither as a purchaser to its vendor nor as a seller-dealer to the State Tax Commissioner.

2. It is our opinion that the Executive Dining Room is exempt as a purchaser under the express provisions of the Sales Act and that it is exempt as a seller-dealer on constitutional grounds, as such would amount to an unconstitutional application.

SIGNED

[redacted] 25X1
Office of General Counsel

OGC:RLB:mej
Distribution:
Original & 1 -ADDRESSEE
1 - Subject Tafes
1 - Signer
1 - Chrono

SECRET

9 September 1966

MEMORANDUM FOR THE RECORD

SUBJECT: Application of the Virginia Retail Sales and Use Tax to the Operations of the Agency Executive Dining Room

25X1

1. [redacted] orally requested of this Office whether the Virginia Sales and Use Tax, effective 1 September 1966, would apply to the operations of the Agency Executive Dining Room.

2. The Executive Dining Room was first established in 1952 to provide the Director, Deputy Director and senior Agency officials a dining room which is physically secure and serviced by cleared personnel, where official functions of operational or representational nature can be held. Mr. John Warner, in an OGC opinion of 9 July 1958, stated: "We believe the basic legal principle involved is that the Director, under the authorities available to him, may properly establish a dining room and necessary facilities if determined to be necessary for official purposes connected with the unique functions of this Agency."

3. The Executive Dining Room is an Agency activity. Personnel operating the Dining Room are without exception staff employees of the Agency, and all charges for operation in the first instance, are placed against confidential funds as proper expenditures by the Agency. Subsequent reimbursement to the Agency is required in the case of Agency employees attending either "official" or "semi-official" meals. As to these "semi-official" meals, it was held in an OGC opinion dated 18 July 1956, that where the Dining Room had been established by the Director for a justifiable official purpose, its use by his senior officials when it is otherwise unoccupied was proper so long as reimbursement was made.

SECRET

4. The Agency is not liable for the tax to its vendor on purchases it makes. Section 58-441.6(1) of the Virginia Retail Sales and Use Tax Act, expressly exempts from its operation tangible personal property purchased by the Government for its use or consumption. Section 1-45 of the Sales and Use Tax Regulations states: "The tax does not apply to sales to the United States, provided purchases are pursuant to required official purchase orders to be paid for out of public funds."

5. The issue then arises as to whether the Agency is subject to the tax as a seller-dealer when serving meals to its member-employees for a consideration. Surely it is not in those instances where it functions in its official capacity, as such would be considered consumption of the property by the Agency. The issue is then narrowed to the liability of the Agency for the tax as a seller-dealer when serving the semi-official meals to member-employees.

6. The tax is levied and imposed as "a license or privilege tax upon every person who engages in the business of selling at retail or distributing tangible personal property in this state." "Person" is defined by the statute to include any "body, politic or political subdivision, whether public or private, or quasi-public, ..."

7. In this instance, the license tax would be levied directly against the Agency, and the Agency would be liable to the State for such tax, notwithstanding the fact the statute requires the seller-dealer to collect the tax from its purchaser.

8. As a general rule a state may not impose a license or privilege tax on the activities of the Federal Government or on the business of any of its agencies or instrumentalities except where the United States has consented to such tax. McCulloch v. Maryland, 17 US 316, 4 L. Ed. 579 (1819); Warren Trading Post Co. v. Arizona Taxing Commission, Arizona, 380 US 685, 14 L. Ed. 2d 165 (1965).

9. The United States in acquiring the land upon which the Agency Headquarters building sits received limited jurisdiction ceded by Section 7-21 of the Code of Virginia over such lands. Section 7-21 of the Code reserved to the Commonwealth the jurisdiction and power to require and impose license taxes upon any business or businesses

conducted on the land. It would appear, however, that the business or businesses intended were more in the nature of private concessionaires operating within the federal land area. This position is buttressed by the regulations issued pursuant to the Virginia Sales and Use Tax, Section 1-39, titled Federal Areas, and which states: "The tax applies to all retail sales by private concessionaires in Federal areas to servicemen, Federal employees and other persons to the same extent that it applies with respect to retail sales elsewhere within the State." If Virginia in its deed of cession to the Government had intended to reserve the power to impose a license tax upon any business of the United States, it seems improbable that the language of the present license tax regulation would be limited as it is to private concessionaires operating in federal areas. The limiting language of the regulation would also seem to suggest by implication that the Sales Act is not meant to apply to sales by Government businesses in federal areas. The Buck Act (4 USC 105-110) was enacted to permit liability by the private concessionaire for state sales and use taxes even though established within a federal area. This statute expressly did not authorize the levy or collection of any tax on or from the United States or any instrumentality thereof.

10. While the general rule enumerated above is still valid, there has over the years been a relaxing of the immunity doctrine, but primarily in situations where the Government is the purchaser or has contracted with a purchaser and the exactions directly affected persons who were acting for themselves and not for the United States. Mayo v. United States, 319 US 441, 87 L. Ed. 1504 (1942). Here the tax is levied directly upon the Government as the seller-dealer. A Comptroller General decision of 12 April 1962 (41 Comp Gen 668) is applicable here. In that case there was a tax similar to the one here and the General Services Administration in disposing of federal surplus property in Texas had collected the sales and use tax from its purchasers and had requested from GAO a decision as to whether the voucher representing the collected tax, could be properly certified for payment to Texas. The decision held that there was no basis upon which Texas could properly require GSA to comply with its tax including the collection provision. In so holding, the Comptroller General distinguished the case under consideration from the Supreme Court decision in Colorado National Bank of Denver v. Bedford, Treasurer of State of Colorado, 310 US 41:

> In the Bank of Denver case the Court held, in effect, that a state law requiring a national bank (which has been held

by the Supreme Court to be a federal instrumentality) to collect and remit from its safe deposit box users a percentage tax on the users of such boxes does not impose an unconstitutional binder on a federal instrumentality.

While a "national bank" may be a federal instrumentality for certain purposes, it is not in the same category as an agency of the U. S. Government, such as the GSA. The GSA is part of the Executive Branch of the Government of the U. S. and its employees are employees of the U. S. Thus, the instant case is clearly distinguishable from the Bank of Denver case.

The Comptroller General then cited a number of cases in which a state had levied a tax or license fee directly upon the Federal Government, and in each case it was denied as an unconstitutional application. However, in each case cited the state tax or license fee was imposed on a governmental function. As stated by the Comptroller General, page 670:

The principle set forth in the above-cited cases is equally for application in the instant case. In disposing of federal surplus property the General Services Administration is conducting the work involved as one of its official activities (i.e., a governmental function) under the Federal Property and Administrative Services Act of 1949. (Emphasis added)

11. In the case at hand, the Director under the special authorities available to him, has established the Executive Dining Room as an official Agency function. The fact that it also serves a semi-official function which is considered by the Agency a justifiable appendage, would not appear to make the Dining Room any less an official Agency function.

12. The subject tax would require the Agency to register with the state as a dealer, to collect the tax, maintain additional accountability records of receipts and deposits and remit to the state tax commissioner. This amounts to a direct burden upon the Government, and for the reasons given above would appear to be an unconstitutional application.

[redacted]

Office of General Counsel

25X1

OGC:RLB:mej
Distribution:
Original - Subject - Tax Ltr - 4
1 - Signer
1 - Chrono